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No. 03-9877

IN THE
Supreme Court of the United States

JON B. CUTTER, ET AL.,
Petitioners,

v.

REGINALD WILKINSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FREE EXERCISE OF RELIGION

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
Phone: (202) 955-0095

Counsel for Amicus Curiae

K. HOLLYN HOLLMAN
BAPTIST JOINT
COMMITTEE
200 Maryland Ave., NE
Washington, DC 20002
Phone: (202) 544-4226

Of Counsel

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INTEREST OF THE *AMICUS*

The Coalition for the Free Exercise of Religion is a coalition of over 50 religious and civil liberties organizations. (Coalition members are listed in Appendix A.) These organizations represent almost every major faith group in America, spanning the full spectrum of religious diversity—Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, and Sikhs. The Coalition includes liberals and conservatives (religious and nonreligious), and groups with world views as disparate as People for the American Way and Liberty Counsel. Though the Coalition includes members who often find themselves on opposite sides of Establishment Clause issues, they speak with one voice in the conviction that accommodating religious exercise by removing government-imposed substantial burdens on religious exercise is an essential element of a democratic society. The Coalition's members supported the enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to achieve this purpose, and now join together to defend its constitutionality. The Coalition takes no position on the merits of the application of RLUIPA to the facts of this case. This brief addresses only the question of whether RLUIPA, on its face, is a constitutionally legitimate exercise of Congressional authority.[1]

SUMMARY OF ARGUMENT

The Establishment Clause theory adopted by the lower court is that legislative accommodations of religious

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[1]All parties have consented to the filing of this brief. A letter of consent from Petitioners Jon B. Cutter *et al.* is on file with the Court. Letters of consent from all other parties have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

exercise are forbidden if they accommodate only religious exercise.[2] Not only would this theory invalidate thousands of long-standing, non-controversial, legislative accommodations of religious exercise at every level of government, but this anti-accommodation rule is also premised on an extreme view of the Establishment Clause that has never garnered the vote of more than a single Justice of this Court (if that), let alone a majority.[3] Accordingly, it is not surprising that courts addressing this argument consistently reject it in cases challenging both the constitutionality of RLUIPA's prisoner provisions (Section 3)[4] and its land-use provisions (Section 2).[5] Similarly, this anti-accommodation rule was squarely rejected by every court to address the issue when it was raised against RFRA—RLUIPA's broader predecessor—both before and after RFRA was struck down as applied to the states on other grounds in *Boerne*.[6]

Courts so consistently uphold RLUIPA because it satisfies all three requirements of the *Lemon* test: (1) RLUIPA has a secular purpose, to minimize government

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[2]*See Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2003).

[3]It appears that the closest any Justice has ever come to accepting such a theory is Justice Stevens' concurrence in *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring), which was not joined by any other Justice. *See also In re Young*, 141 F.3d 854, 863 (8th Cir. 1998) (rejecting challenge to RFRA for accommodating religious without also accommodating atheists, because challenge "direct[ly] contradict[s] the declaration of a majority of the Supreme Court in" *Amos*).

[4]*See, e.g., Benning v. Georgia*, Nos. 04-10979 & 02-00139, __ F.3d __, 2004 WL 2749172 (11th Cir. Dec. 2, 2004) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA Section 3); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir. 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3), *cert. denied sub nom. Alameida v. Mayweathers,* 124 S.Ct. 66 (2003); *Williams v. Bitner,* 285 F. Supp. 2d. 593 (M.D. Pa. 2003) (rejecting constitutional challenges to RLUIPA Section 3); *Glick v. Norris*, No. 5:03CV00160 (E.D. Ark. Aug. 11, 2004) (same); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same); *Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003) (same); *Gordon v. Pepe,* No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3), *vacated on other grounds, Taylor v. Groom*, No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark. Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, (E.D. Cal. 2001) (same).

[5]*See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (rejecting Establishment Clause challenge to RLUIPA Section 2); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) (rejecting constitutional challenges to RLUIPA Section 2); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003) (same); *Murphy v. New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (same); *Westchester Day Sch. v. Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (same); *Guru Nanak Sikh Soc'y v. County of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (same) *vacated on other grounds* 2004 WL 595392 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church v. Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same). *See also Cottonwood Christian Ctr. v. Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (RLUIPA "appear[s] to . . . be within Congress's constitutional authority").

[6]*See, e.g., In re Young*, 141 F.3d at 863 ("RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.) (same), *vacated on other grounds*, 521 U.S. 507 (1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir. 1996) (same) *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 507 (1997); *Jama v. United States*, Nos. 97-3093 & 98-1282, __ F. Supp. 2d __, 2004 WL 2538275, *25 (D.N.J. Nov. 10, 2004) (same).

interference with religious exercise; (2) it does not have the primary effect of advancing religion, because alleviating substantial government burdens on religious exercise—even exclusively, as religious accommodation laws do—does not involve the government *itself* advancing religion; (3) and the statute entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In short, RLUIPA, like so many other statutes accommodating religious exercise, fits comfortably within the "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (internal quotation omitted). Indeed, such accommodations "follow[] the best of our traditions" by relieving substantial regulatory burdens on religious exercise. *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

Finally, if the Court chooses to reach the Spending and Commerce Clause challenges not addressed by the lower court, it should reject those challenges as well.

ARGUMENT

I. RLUIPA Section 3 Is Consistent with the Establishment Clause.

A. RLUIPA Has a Secular Purpose.

RLUIPA was passed for the secular government purpose of "protect[ing] the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Madison*, 355 F.3d at 317. As this Court made clear in *Amos*, it is a "*proper purpose* [to] lift[] a regulation

that burdens the exercise of religion." *Amos*, 483 U.S. at 338 (emphasis added); *id.* at 339 (noting the "permissible purpose of limiting governmental interference with the exercise of religion"). Indeed, it has been a consistent refrain of this Court's Establishment Clause jurisprudence that it is a permissible government purpose to limit government interference with the exercise of religion.[7]

These cases simply emphasize this Court's admonition that the requirement of a secular purpose "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (internal quotation omitted). Thus, "the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause." *Id.*, 483 U.S. at 334. *See also Zorach*, 343 U.S. at 314 (accommodating religious exercise "respects the religious nature of our people and accommodates the public service to their spiritual needs").

Indeed, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court's decision in *Employment Division v. Smith* made clear that people of faith should turn in the first instance to the

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[7] *See, e.g., Larkin v. Grendel's Den*, 459 U.S. 116, 123-24 (1982) (finding secular purpose in regulating liquor sales in manner to protect disruption of church activities); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption from military draft that lifts government-imposed burden on religious exercise of conscientious objectors advances a permissible secular purpose); *Zorach*, 343 U.S. at 314 (excepting religious students from mandatory public school attendance during certain hours of the day to obtain religious instruction does not violate Establishment Clause).

legislative and executive branches, rather than the courts, for the protection of religious liberty:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also *a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.*

494 U.S. 872, 890 (1990) (emphasis added).

Thus, for example, while *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval the many legislative accommodations of religious peyote use. *Id.* (noting that "a number of States have made an exception to their drug laws for sacramental peyote use"). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.[8]

Accordingly, RLUIPA's purpose of alleviating government burdens on prisoners' religious exercise is a permissible secular purpose. *See Amos,* 483 U.S. at 335; *Zorach*, 343 U.S. at 314.[9] *See also Benning*, 2004 WL

[8]*See, e.g., Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, . . . the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for religious use do not violate Establishment Clause).

[9]Moreover, this Court's precedent makes clear that the Free Exercise Clause requires the government to provide some accommodation of

2749172, at *8-9 (holding that RLUIPA Section 3 has secular purpose of alleviating burdens on religious exercise); *Madison*, 355 F.3d at 310 (same); *Charles*, 348 F.3d at 610 (same); *Mayweathers*, 314 F.3d at 1068 (same).

B. RLUIPA Does Not Have the Primary Effect of Advancing Religion.

1. RLUIPA does not cause the government *itself* to advance religious exercise, but rather to avoid interference with private actors as they engage in religious exercise.

RLUIPA satisfies the second *Lemon* factor, because alleviating burdens on religious exercise does not have the primary effect of advancing religion. RLUIPA merely reduces intrusion and oversight by the government into how individuals practice their religion. While this may better enable those *individuals* to advance *their* religious purposes, this Court has held this to be a permissible effect:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First

prisoners' religious exercise. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, . . . including its directive that no law shall prohibit the free exercise of religion."); *Cruz v. Beto*, 305 U.S. 319, n. 5 (1972) ("reasonable opportunities must be afforded to all prisoners to exercise" their religion). Alhough RLUIPA goes beyond the minimum level of accommodation this Court has held is necessary in prisons, the Act's purpose of lifting government-imposed burdens on the religious exercise of prisoners is no less permissible than that of the Free Exercise Clause, which also requires lifting some (albeit fewer) burdens of this sort.

> Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Amos, 483 U.S. at 337 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)) (emphasis in original).

Here, RLUIPA, like the Title VII exemption approved in *Amos*, does not involve the *government itself* advancing religion.[10] Instead, RLUIPA simply permits prisoners some latitude to practice and define their own religious exercise by limiting government interference. Put another way, RLUIPA's lifting of any non-compelling, state-imposed regulation that substantially burdens religious exercise is an example of "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship and without [government] interference." *Amos*, 483 U.S. at 334. *See Madison*, 355 F.3d at 318 ("Congress has simply lifted

[10]*Amos* cannot be distinguished on the grounds that the Title VII accommodation at issue there was required by the Religion Clauses. *See Cutter*, 349 F.3d at 263 (suggesting that the accommodation in *Amos* was necessary to avoid violating First Amendment). That issue was not addressed in *Amos*. Indeed, the Court expressly *declined* to rest its decision on the ground that Title VII's applicability to religious groups, prior to the enactment in 1972 of the legislative accommodation for religious organizations challenged in *Amos*, violated the Free Exercise Clause so that the 1972 amendment was constitutionally mandated. *Amos*, 483 U.S. at 336 ("We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more"). Moreover, the Court took pains to point out that "[i]t is well established . . . that [t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.*, 483 U.S. at 334 (internal quotation omitted). Equally infirm is the argument that the Court based its decision upholding the exemption in *Amos* on the view that the exemption was required by the Establishment Clause. As the Eleventh Circuit recently pointed out, "no such language or distinction" that would support such a position appears in the majority opinion in *Amos*. *Benning*, 2004 WL 2749172, at *11.

government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths"). That benevolent neutrality is especially important in prison, where every facet of a person's life is controlled by the government, and religious exercise is all but impossible without the government's affirmative acquiescence and accommodation.[11]

2. None of the rationales proffered by the lower court distinguishes RLUIPA from the myriad accommodations of religious exercise by the political branches that "follow[ ] the best of our traditions."

In discussing the effects prong of *Lemon*, the lower court failed meaningfully to distinguish the controlling analysis of *Amos,* or its application by the numerous other courts upholding RLUIPA and RFRA against Establishment Clause challenge. The lower court's anomalous opinion

[11]A similar desire to lift government-imposed burdens on religious exercise in the heavily regulated area of land-use motivated Congress to enact RLUIPA's land use provisions. Congress "compiled massive evidence," 146 CONG. REC. S7774 (daily ed. July 27, 2000)—based on nine hearings over three years—that the autonomy and vitality of houses of worship were threatened by the pervasive and discretionary regulation embodied in local land-use laws. *See* 146 CONG. REC. S7775 ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case"). Thus, the passage of RLUIPA—both its land use and prisoner provisions—is testament to the fact that religious organizations rely heavily on *Amos*' upholding of legislative accommodations of religious exercise. Any narrowing of *Amos* that would require accommodations to come packaged with accommodations for secular interests would severely impact religious liberty by making it far more difficult to enact laws that carve out space within the regulatory state for the free exercise of religion.

invokes four rationales in an effort to escape *Amos*, all foreclosed by longstanding precedent of this Court.

a. The Establishment Clause does not prohibit laws passed solely to accommodate religious exercise.

The lower court did not even attempt to show that RLUIPA involves the "government itself" advancing religion. *Amos*, 483 U.S. at 337. Nonetheless, the lower court still faulted RLUIPA because it accommodates religious exercise without *also* accommodating other rights. *See Cutter*, 349 F.3d at 266. But this Court has expressly rejected this rule, holding instead that where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. Legion other courts have rejected arguments like this over and over again in upholding Sections 2 and 3 of RLUIPA.[12] Nor could it be otherwise, as the theory below is fraught with problems on many levels.

[12] *See, e.g., Benning*, 2004 WL 2749172, at *9 ("Singling out free exercise rights for protection is not an impermissible endorsement of religion. . . . [T]he Supreme Court has not held that legislative protections for fundamental rights march in lockstep.") (internal quotation omitted); *Madison*, 355 F.3d at 318-19 (holding that under *Amos* "[t]he Establishment Clause's requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights."); *Mayweathers*, 314 F.3d at 1069 (holding that under *Amos*, RLUIPA "does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners."); *Charles*, 348 F.3d at 610 (same); *Johnson*, 223 F. Supp. 2d at 826 (rejecting argument "that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion").

First, it presents insuperable practical problems. On the lower court's view, the Establishment Clause would run amok, taking a wrecking ball to countless acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise. *See, e.g., Benning*, 2004 WL 2749172, at *9 (holding that any Establishment Clause interpretation that prohibited laws designed solely to protect religious exercise "would cut a broad swath through a forest of government programs and protections of religious exercise"); *Madison*, 355 F.3d at 320 (declining to follow *Cutter* because its Establishment Clause interpretation "would throw into question a wide variety of religious accommodation laws").

For starters, the lower court's anti-accommodation rule would invalidate the special protections afforded to religious exercise by *Ohio's Constitution*. Although the federal Free Exercise Clause extends only rational basis scrutiny to neutral and generally applicable laws that burden religious exercise, *see Smith*, *supra*, Ohio goes beyond the federal constitutional floor and provides broader protection under its state constitution by applying strict scrutiny to *all* laws (even neutral and generally applicable ones) that burden religious exercise. *See Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000).[13] Thus, Ohio's Constitution provides special protection to claims for religious exemptions, without extending parallel protections to corresponding non-religious claims. But under the lower court's rule, this protection for religious exercise would violate the Establishment Clause.

The decision below would similarly run roughshod over a whole host of *Ohio statutes* that accommodate religious exercise by affirmatively lifting burdens on

[13] *See also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution").

religious exercise, without also lifting burdens on non-religious activities. Appendix B to this brief lists a sample of Ohio laws that accommodate religious exercise. Because none of these laws also seeks to accommodate other secular constitutional rights, the lower court's test would arguably strike down most, if not all, of these Ohio laws.[14]

Moreover, if allowed to stand, the rationale of the court below would potentially invalidate numerous other federal and state acts whose *sole* purpose and effect is to accommodate religious exercise. This includes, among many others, the *federal statutory* accommodations of religious peyote use,[15] religious headwear in the military,[16] and Native American religious exercise on federal land;[17] other *state constitutional* provisions that, like Ohio's discussed above, provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;[18] *state statutes* that provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;[19] *prison and armed forces chaplaincy programs* that facilitate religious exercise (and only religious exercise);[20] the state and federal *clergy-*

[14]By listing the various religious accommodations in the Appendix, the members of the Coalition do not intend to express that they consider any or all of them good policy or even that each of them is constitutional under the Establishment Clause. The point, instead, is that the constitutionality of all of these accommodations would be called seriously into question if the lower court's opinion stands.

[15]*See* 42 U.S.C. § 1996a (requiring states to allow the Native American Church to use peyote in religious ceremonies). *See also Benning*, 2004 WL 2749172, at *9 (noting that 28 state statutes provide a religious exemption for peyote use).

[16]*See* National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774; *see also Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) ("[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.") (citation omitted).

[17]*See* Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (de-funding project that would have destroyed government land used for Native American religious exercise in response to statement in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 435 U.S. 439, 454 (1988), that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religio. practices like those engaged in by the Indian respondents").

[18]Since this Court's *Smith* decision, the courts of at least *ten* states besides Ohio have held that their state constitutions provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. *See, e.g., In re Browning*, 476 S.E.2d 465 (N.C. 1996); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *State v. Evans*, 796 P.2d 178 (Kan.1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

[19]Since this Court's *Smith* decision, the political branches of at least *thirteen* states have, either by statute or constitutional amendment, provided stronger protection for religious exercise (and only religious exercise). Those thirteen states are Alabama, *see* ALA. CONST. amend. 622; Arizona, *see* ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, *see* CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, *see* FLA .STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, *see* IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois, *see* 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); Missouri, *see* V.A.M.S. §§ 1.302 & 1.307 (West 2004); New Mexico, *see* N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, *see* OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, 71 PA. CONS. STAT. ANN. 2401 *et seq.*; Rhode Island, *see* R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, *see* S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

[20]*See, e.g., Mockaitis*, 104 F.3d at 1530 (observing that RFRA does not impermissibly promote religion anymore than "[t]he creation of chaplaincies . . . in the armed forces ."); *Katcoff v. Marsh*, 755 F.2d 223,

penitent privilege;[21] and even *particular prison regulations* adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).[22]

Another strange consequence of the lower court's reasoning is that if legislative and executive officials would merely tack on to each protection of religious exercise the protection of another right, then the entire (alleged) constitutional problem would disappear. But the Establishment Clause does not exist to require government actors to undertake such formalistic (and completely unprecedented) exercises. *See Madison*, 355 F.3d at 320 (noting "[t]he byzantine complexities that such compliance would entail"). Indeed, this Court has squarely rejected that argument when it explained that it:

> has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, *we see no reason to require that the exemption comes packaged with benefits to secular entities*.

Amos, 483 U.S. at 338 (emphasis added).

Indeed, if the purpose of the Establishment Clause really were to preclude laws that *single out* religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. *See Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

Second, the lower court's theory creates a conceptual problem. The Establishment Clause certainly *does* require some form of "neutrality," but that neutrality is "between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)—*not* between religious exercise and all other rights or values, as the lower court would have it. Certainly government cannot affirmatively advance or benefit the religious at the expense of the nonreligious: the state cannot imprison those who refuse to believe in a Creator, or withhold welfare checks from the atheist. But the government can—and often does—protect a *single* right or value in a particular piece of legislation or regulation, and free religious exercise is no exception.[23] Such government actions do not "prefer"

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232 (2d Cir. 1985) (rejecting Establishment Clause challenge to military chaplaincy program).

[21]All fifty states and the federal government specially accommodate religious exercise by recognizing some form of the clergy-penitent privilege. *See Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 231 & n.39 (April 1998).

[22]*See, e.g.,* Federal Bureau of Prisons, Program Statement on Religious Beliefs and Practices, PS 5360.08 (May 25, 2001) (available at http://www.bop.gov/progstat/5360_008.pdf), at 15 (providing religious prisoners accommodation for religious use of wine, an otherwise contraband substance); *id.* at 10-11 (providing religious prisoners relief from generally applicable work duties in order to observe religious holidays); *id.* at 11-12 (providing religious prisoners accommodation to allow visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders).

[23]*See, e.g.,* Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and providing journalists with greater protection against searches and seizures); Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (reacting to statement in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988), that "[t]he Government's

religion over irreligion; instead, they simply protect religious exercise, just as they would any other right or value.[24] As Judge Wilkinson, writing for the Fourth Circuit, recently held, "[i]t was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." *Madison*, 355 F.3d at 319. Moreover, this Court has never held or even suggested "that legislative protections for fundamental rights march in lockstep." *Id.* at 318. Not only would "a requirement of symmetry of protection for fundamental liberties" ignore this Court's precedent, "but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn." *Id.* at 319.

Lacking any authority of this Court or any other for its position, the lower court was forced to rely on a hypothetical discussed in the overruled decision in *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D.Va. 2003), *overruled* 355 F.3d 310 (4th Cir. 2003). The court posited two white supremacist prisoners—one secular and the other an adherent to the Church of Jesus Christ Christian, Aryan Nation—who

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rights to the use of its own land . . . *need not and should not discourage it from accommodating religious practices* like those engaged in by the Indian respondents" (emphasis added), and defunding the project at issue in *Lyng* that would have destroyed the government land used for religious exercise); Exemption Act of 1988, 26 U.S.C. § 3127 (reacting to *United States v. Lee*, 455 U.S. 252 (1982), which declined to recognize Amish free exercise of religion claim, providing a tax exemption for employers and their employees who are members of "a recognized religious sect" whose "established tenets" oppose participation in Social Security); National Defense Authorization Act, 10 U.S.C. § 774.

[24]Following the lower court's logic to its conclusion leads to other absurdities. For example, if protecting religious exercise rights alone reflects impermissible *favor* for religion, then protecting any right alone *other than* religious exercise would reflect impermissible *disfavor* for religion. *See Benning*, 2004 WL 2749172, at *9.

want to challenge a prison's decision not to let them possess white supremacist literature. According to the hypothetical, assuming the showing of a substantial burden on religious exercise, the religious prisoner would be able to challenge a failure to accommodate his beliefs under RLUIPA's strict scrutiny standard, while the secular prisoner's free speech and association claims against the policy would be governed by the more deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). Thus, the lower court asserted, RLUIPA's accommodation of religious exercise "advance[s] religion generally by giving religious prisoners rights superior to those of nonreligious prisoners." *Cutter*, 349 F.3d at 266.

This hypothetical does not raise an Establishment Clause concern any more than does any other religious accommodation that ordinarily permits religiously motivated persons to engage in conduct forbidden to persons motivated by secular reasons. For example, secular employers, unlike religious employers, do not have an exemption under Title VII to implement hiring standards that favor co-religionists and disfavor those of other faiths. Nonetheless, this Court upheld such an accommodation in *Amos*.

Moreover, applying the reasoning of this hypothetical to factual circumstances *actually addressed* by this Court reveals starkly that this Court has *already* rejected that reasoning. For example, in *Amos*, this Court approved a provision of Title VII that exempted religious organizations—and only religious organizations—from the statute's general prohibition of religious discrimination in employment. *See also Madison*, 355 F.3d at 319 (*Amos* "does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened").

And why has this Court (and faithful lower courts) so consistently rejected Establishment Clause challenges to these laws? In short, government must be free to *specially*

deregulate religious exercise, because it is a category of private activity in which government interference is *uniquely* misplaced. To challenge that is to challenge the values embodied in the Religion Clauses themselves. The same principle applies to RLUIPA—it lifts burdens only on religious exercise in order to *minimize* government interference with a human phenomenon that the Constitution itself recognizes to be uniquely sensitive to government interference.[25] Thus, in accordance with the overwhelming weight of authority—and notwithstanding the superficial appeal of a single hypothetical—RLUIPA does not offend the Establishment Clause.[26]

Third, the lower court's theory ignores the history of the Religion Clauses. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.[27] And, as discussed

[25]Of course, the First Amendment and laws like RLUIPA seek only to minimize government involvement in private religious conduct, not to eliminate it altogether. Even under these laws, whenever the specific religious practice of white supremacists (or any other prisoner) would create a demonstrable threat to the safety of other prisoners or to prison security, prison administrators could still forbid the practice.

[26]In any event, even if it were conceivable that granting a particular accommodation requested by a prisoner would place the government at risk of violating some other constitutional right—and *no* RLUIPA or RFRA case to date has presented such a situation—such hypotheticals are not grounds to sustain a facial challenge to the Act.

[27]*See, e.g., Kiryas Joel v. Grumet*, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."); *Walz*, 397 U.S. at 676 ("Few concepts are more deeply embedded in the fabric of our national life … than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.") (emphasis added); *Benning*, 2004 WL 2749172, at *9 (declining to follow *Cutter* because "[a] sweeping invalidation of all accommodations of religion is wholly inconsistent with the history, traditions, and laws of our nation").

previously, accommodations by the political branches are all the more imperative since *Smith* narrowed the judiciary's role in this area. In other words, if the lower court's theory were accepted, then the *Smith* Court's invitation to enact religious accommodations, *see Smith*, 494 U.S. at 890, would appear to be an inducement to violate the Establishment Clause.[28]

For all these reasons, then, this Court should reject the lower court's invitation to depart from prior precedent and hold unconstitutional laws that focus solely on removing government-imposed burdens on religious exercise.

b. The mandates of the Free Exercise Clause are not a ceiling on permissible accommodation of religious exercise.

The lower court also suggested that RLUIPA impermissibly advances religion because its accommodation of religious exercise exceeds what this Court has required under the Free Exercise Clause in the prison setting. *See Cutter*, 349 F.3d at 266. But this argument proves too much. On this theory, *any* accommodation of prisoner religious exercise that is not mandated by the Free Exercise Clause would violate the Establishment Clause.

Once again, this argument ignores the nation's long history of specially accommodating religious exercise; would invalidate wholesale numerous federal and state laws that accommodate religion beyond what the Free Exercise Clause requires; and ignores *Smith*'s specific invitation to the political branches to provide that additional measure of

[28]Notably, the *Smith* Court, in encouraging the political branches to take responsibility for accommodating religious exercise, did not even *suggest* that those accommodations would be permissible only if packaged with other "secular" rights.

accommodation.[29] But most importantly, *Amos* forecloses this argument. As the Court put it there, "[i]t is well established . . . that the limits of permissible accommodation of religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334.

c. RLUIPA does not have any impermissible effects on the interests of others.

As an alternative argument under *Lemon*'s effects prong, the lower court's opinion asserts that RLUIPA has impermissible effects on "non-religious persons." *Cutter*, 349 F.3d at 266. The only authority cited by the lower court in support of its position is the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). But in finding that the Texas statute's unqualified exemption of certain religious publications from a state sales tax was unconstitutional, that plurality opinion expressly distinguished the case before it from one involving "remov[al of] a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15 (plurality opinion). Here, of course, RLUIPA alleviates just such a deterrent to religious exercise, by generally relieving substantial burdens on prisoners' religious exercise. *See also id.* at 18 n.8 ("we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden

[29] *See, e.g., United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1562 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984) ("[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place."); *Mayweathers*, 314 F.3d at 1070 ("RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court. . . . Rather, RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty").

by the Establishment Clause unless they are mandated by the Free Exercise Clause.") (emphasis in original).

Moreover, unlike the absolute exemption for religious publications in *Texas Monthly*, RLUIPA does not give religious prisoners an unfettered right to religious exercise. To the contrary, in both its text and implementation by the courts, RLUIPA takes account of the countervailing interests that non-religious persons might have in response to a particular religious practice. Thus, for example, if a prisoner's desired religious practice were to create a safety or security risk for other prisoners or prison guards, the Act does not require those third parties to bear that harm. The Act's legislative history specifically notes that the right to engage in a particular religious practice under RLUIPA may be overcome where a prison demonstrates that the practice would adversely affect the ability to "maintain good order, security and discipline."[30] Consistent with this design, a substantial body of case law under RLUIPA and RFRA confirms that safety and security risks are exactly the types of "compelling interest[s]" that justify prison administrators' denial of accommodation requests.[31]

In addition, unlike the statute held invalid in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (striking down a Connecticut statute imposing an *absolute* condition that private employers retain private employees who refused

[30] Joint Statement, 146 CONG. REC. at S7775.

[31] *See, e.g., Charles v. Frank*, 2004 WL 1303403, at *2 (7th Cir. Jun. 4, 2004) (holding that "suppressing gang activity to promote a secure and safe prison environment is indisputably a compelling interest"); *Ulmann v. Anderson*, No. 02-405, 2004 WL 883221, at *8 (D.N.H. Apr. 26, 2004) (denying prisoner access to religious item that could be converted into a weapon advanced prison's compelling interest of maintaining safety). *See also May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (holding under RFRA that maintaining prison security is a compelling government interest); *Lawson v. Singletary*, 85 F.3d 502, 512 (11th Cir. 1996) (same); *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (same).

to work on the Sabbath), RLUIPA does not invest religious prisoners with absolute rights. Instead, it provides a means to account for the interests of others who might be impacted by a particular religious practice. Moreover, unlike RLUIPA, the *Caldor* statute did not lift a government-imposed burden on religious exercise; instead, it lifted privately-imposed burdens on religious exercise by imposing "substantial" and "significant" costs on other private parties. *Id.* at 708-10. Given RLUIPA's differences from the Connecticut statute, it is not surprising that the lower court in this case did not even attempt to rest its holding on *Caldor*.

At the very least, there is no basis for holding RLUIPA to be *facially* unconstitutional because of any alleged impermissible effects on others. In many, if not most, RLUIPA cases, the requested accommodation will not impose any harm at all on other prisoners, guards, or other third parties. For example, it is difficult to see how allowing a Greek Orthodox prisoner to receive communion wine or a Jewish prisoner to receive a kosher diet has any adverse impact on the lives of other prisoners or prison guards. Certainly these examples appear to pose less of a threat to the safety of prisoners and prison guards than other practices that Ohio's prisons *do* allow, such as allowing prisoners to wield the instruments necessary to slaughter animals.[32]

Lacking any precedent, then, for its holding that RLUIPA has impermissible effects on "non-religious persons," the lower court resorted to conjecture, asserting that RLUIPA will "induce prisoners to adopt or feign religious belief in order to receive the statute's benefits." *Cutter,* 349 F.3d at 266. As an initial matter, the lower court's claim rests on the dubious assumption that the religious exercise RLUIPA accommodates is typically

[32]*See* "Inmates to Help Slaughter Their Own Beef" http://www.wkyc.com/news/news_fullstory.asp?id=25937.

desirable to other prisoners. But this assumption has no basis in the record before Congress or elsewhere. Acts of religious faith, though deeply meaningful to an adherent, often appear irrational or baffling to a non-adherent, thus inviting derision rather than envy. Similarly, the rigorous attention to detail and form required by many religious observances (*e.g.,* keeping a kosher diet) makes feigned devotion improbable.[33]

But even if a few prisoners did feign belief to try to take advantage of RLUIPA, the Act (like RFRA) does not prevent prison administrators from inquiring, as courts also may, into the sincerity of the religious beliefs of prisoners. Indeed, RLUIPA calls for such an inquiry, and puts the burden of proof on the prisoner-claimant. Just as sincerity of belief is a "threshold requirement" for a Free Exercise claimant,[34] so too have lower courts held that it is a threshold showing for a RLUIPA or RFRA claimant.[35] Thus, even assuming that a flood of religion-faking, claim-filing prisoners were to emerge after RLUIPA—and there is absolutely no evidence that it has—prison administrators retain the means to address the issue of feigned belief.

Finally, even where a particular religious accommodation may be desirable for reasons other than faith, (*e.g.,* consuming wine for communion), that fact alone would hardly render an accommodation unconstitutional. If that

[33]In addition, the fact that religious practice typically imposes various kinds of costs on its practitioners greatly reduces the risk of feigned religiosity. *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (costs and burdens borne by overtly religious colleges significantly reduces the risk that a college will feign religiosity in order to receive a religious exemption from federal labor laws).

[34]*See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002).

[35]*See, e.g., Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (RLUIPA requires a showing that the desired conduct is "motivated by sincere religious belief"); *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir. 2001) (sincere religious belief required to prevail under RFRA).

were true, then all sorts of religious accommodations in all sorts of contexts (even those required by the more deferential *Turner v. Safley* test) would be at risk of violating the Establishment Clause by creating some incentive, no matter how small, to feign religious belief. For example, such an inducement to feign religious belief would presumably arise from an act providing a religious exemption from the general prohibition against peyote use. Indeed, if peyote is a desirable (yet dangerous) hallucinogenic substance, as those who have outlawed it believe, *see* 21 U.S.C. § 812 (making peyote a Schedule 1 controlled substance), the inducement to fake religious devotion to obtain the benefit of the accommodation would seem particularly strong. But in directing religious peyote users to the legislature to obtain a religious exemption, this Court did not even suggest that the exemption might induce false piety in violation of the Establishment Clause. *See Smith*, 494 U.S. at 890.[36]

d. RLUIPA scrupulously avoids any impermissible endorsement of religion.

Finally, the argument of the lower court drawn from endorsement jurisprudence must also fail, as RLUIPA avoids any impermissible endorsement of religion in general, or of any particular religion. In the lower courts, some prison officials have argued that RLUIPA violates *Lemon*'s "effects" prong because it "convey[s] a message that religion is favored or preferred . . . over disbelief." *See, e.g.*, Brief of Defendants-Appellants at 49 in *Charles v. Verhagen*, No. 02-3572 (7th Cir. 2003) (arguing that RLUIPA impermissibly "favor[s] religious belief over disbelief") (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring)). But that argument—which would also make

[36]Congress took this Court at its word in *Smith* and passed the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a, which allows the Native American Church to use peyote.

religious accommodations *per se* unconstitutional—is flatly contrary to *Amos* and to other decisions of this Court and opinions of its individual Justices. Indeed, this Court has *never* invalidated an accommodation on this ground.

The accommodation upheld in *Amos*, for example, was limited to religious employers seeking to make personnel decisions on the basis of religious criteria. The statute contained no analogous accommodation for organizations—like gender or race-specific advocacy groups—that might have had similarly legitimate reasons for making personnel decisions on the basis of gender or race. Yet no member of the Court found that this disparity created an impermissible endorsement of "religion . . . over disbelief" or, indeed, of the religious over the secular.

Justice O'Connor's opinion concurring in the judgment cogently explained why this disparity is not an endorsement of religion. She noted that, even where an accommodation is limited to religion and is not required by the First Amendment, it will not give rise to an impermissible endorsement as long as there is "an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) (emphasis in original). That is because, as Justice O'Connor had previously explained in *Wallace v. Jaffree*, the endorsement inquiry must be undertaken from the standpoint of a well-informed, "objective observer," who "is acquainted with the Free Exercise Clause *and the values* it promotes." 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (emphasis added). Thus, even where an accommodation is not constitutionally required, "one can plausibly assert that government pursues Free Exercise Clause *values* when it lifts a government-imposed burden on the free exercise of religion." *Id.* (emphasis added). In that circumstance, an "objective observer should perceive the Government action as an accommodation of the exercise of

religion rather than as a Government endorsement of religion." *Amos*, 483 U.S. at 349.

The same analysis applies here, with at least as much force as in *Amos*. Here, there can be no question that incarceration itself creates significant, government-imposed burdens on religious exercise. *See, e.g., Turner*, 482 U.S. at 89-90. By providing a means in some cases for those burdens on religious exercise to be lifted, RLUIPA, like the statute in *Amos*, is properly seen "as an accommodation of the exercise of religion rather than as a Government endorsement of religion." *Amos*, 483 U.S. at 349.

Furthermore, RLUIPA poses even less of an endorsement issue than the statute in *Amos*. Whereas the statute in *Amos* created a blanket religious exemption, RLUIPA does not seek to lift burdens on religious exercise across the board. Instead, RLUIPA first requires that a prisoner demonstrate that a *specific* state-imposed restriction imposes a substantial burden on that specific prisoner's religious exercise.[37] This requirement guarantees that, in every case, there is "in fact . . . an identifiable burden *on the exercise of religion* that can be said to be lifted by" the statute. *Amos*, 483 U.S. at 348 (emphasis in original). But that is not all. As discussed above, RLUIPA then allows a state to preserve its restriction—and the corresponding burden on religious exercise—if it can demonstrate that the restriction is the least restrictive means of pursuing a compelling state interest. *See* 42 U.S.C. § 2000cc-1(a).

Thus, unlike the statute upheld in *Amos*, RLUIPA's burden-lifting function is both burden-specific and contingent on the absence of countervailing compelling state interests.

[37]*See* 42 U.S.C. § 2000cc-2(b) ("the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion").

If the general burden-lifting statute upheld in *Amos* does not create an impermissible endorsement, *a fortiori* the much more limited burden-lifting provisions of RLUIPA cannot create such an endorsement either.

RLUIPA's generality further minimizes any possible risk of impermissible endorsement. To be sure, this Court has never required religious accommodations to be of equal benefit to all beliefs and believers. *See, e.g., Lee*, 505 U.S. at 628–29 (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, … the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans"). But where, as here, the accommodation statute is cast in general terms and, in principle, is equally available to all believers of whatever stripe, the risk that an objective observer will see the exemption as "Government endorsement of religion" rather than as a legitimate "accommodation of . . . religion," *Amos*, 483 U.S. at 349, is truly minuscule.

In sum, RLUIPA does not "impermissibly advance" religion within the meaning of this Court's Establishment Clause jurisprudence. *Lemon*, 403 U.S. at 613. *See also Amos*, 483 U.S. at 348 (permissible accommodations are not "unjustifiable awards of assistance" to religious people or organizations) (O'Connor, J., concurring). For RLUIPA does not involve the "government itself" advancing religion, *Amos*, 483 U.S. at 337. Instead, the Act "pursues Free Exercise Clause values [by] . . . lift[ing] a government-imposed burden on the free exercise of religion." *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

C. RLUIPA Does Not Foster Excessive Entanglement with Religion.

No circuit court, not even the court below,[38] has found RLUIPA excessively entangling, as RLUIPA entails no greater entanglement than the ordinary application of Free Exercise doctrine. For example, even under the deferential *Turner* test for Free Exercise claims, the government must determine whether the practices to be accommodated are both religious and sincerely held.[39] Thus, RLUIPA "does not require prison officials to develop expertise on religious worship," *Mayweathers*, 314 F.3d at 1069, any more than the well-established *Turner* test does.[40] Thus, finding excessive entanglement here would contradict not only common sense, but also this Court's emphasis that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Amos*, 483 U.S. at 334 (internal quotation omitted).

[38]*See Cutter*, 349 F.3d at 267 ("[W]e question whether RLUIPA requires any greater interaction between government officials and religion than exists under present law").

[39]*See, e.g., Sutton v. Rasheed*, 323 F.3d 236, 250-51 (3d Cir. 2003) (holding that a court deciding an inmate's Free Exercise claim must first determine whether the belief at issue is "religious" and "sincere"); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (same); *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987) (same); *Dettmer v. Landan*, 799 F.2d 929, 931-32 (4th Cir. 1986) (same). *See also Mockaitis*, 104 F.3d at 1530 ("Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement").

[40]In addition, RLUIPA's definition of "religious exercise," 42 U.S.C. § 2000cc-5(7)(A), like Free Exercise doctrine itself, is designed to minimize entanglement by precluding inquiry into the rationality of a belief or its centrality within a system. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

In sum, because RLUIPA—like so many other religious accommodations—satisfies all three elements of the *Lemon* test, it does not violate the Establishment Clause.

II. RLUIPA Section 3 Is a Constitutional Exercise of Congress' Spending Power.

Every court to address the issue of whether RLUIPA Section 3 is a valid exercise of Congress' Spending Power has concluded that RLUIPA fits comfortably within the limits of that power.[41] The Coalition's members fully agree with the analysis of the lower courts that have rejected Spending Clause challenges, as well as with the arguments submitted by the Petitioners in this case.

III. RLUIPA Section 3 Is a Constitutional Exercise of Congress' Commerce Power.

In *United States v. Lopez*, 514 U.S. 549, 561 (1995), this Court made clear that a statute enacted under the Commerce Clause is not facially unconstitutional if it contains a jurisdictional element that "ensure[s], through case-by-case inquiry, that [the activity in question] affects interstate commerce." Unlike the challenged statutes in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), RLUIPA *is* supported by an "express jurisdictional element which might limit its reach to a discrete set of [burdens on prisoners' religious exercise] that additionally have an explicit connection with or effect on interstate commerce." *Morrison,* 529 U.S. at 611-12 (internal quotation omitted). Accordingly, the presence of a jurisdictional element in RLUIPA Section 3(b)(2) suffices alone to reject a *facial* challenge to the Act as exceeding the limits of the Commerce

[41]*See, e.g., Benning*, 2004 WL 2749172, at *3-6 (rejecting Spending Clause challenge to RLUIPA Section 3); *Charles*, 348 F.3d at 608 (7th Cir. 2003) (same); *Mayweathers,* 314 F.3d at 1067 (9th Cir. 2002) (same).

power: by its own terms, RLUIPA applies only to conduct affecting "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). *Compare id. with* U.S. CONST. Art. I., § 8, cls. 3.

The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 3(b)(2), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. But if the facts do not satisfy the jurisdictional element, then the Act does not even *reach* the conduct under the commerce power. Thus, RLUIPA respects constitutional limits by not regulating conduct outside the scope of the Commerce power. *See, e.g., United States v. Grassie,* 237 F.3d 1199, 1211 (10th Cir 2001) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] … to be decided on a case-by-case basis, constitutional problems are avoided"). In other words, the Act applies either constitutionally, or not at all.

CONCLUSION

For the foregoing reasons, this Court should uphold Section 3 of RLUIPA as constitutional.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
Counsel of Record
DEREK L. GAUBATZ
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036
Phone: (202) 955-0095

December 20, 2004 *Counsel for Amicus Curiae*

APPENDIX A

The Coalition for the Free Exercise of Religion includes the following organizations:

Agudath Israel of America
Aleph
American Center for Law and Justice
American Ethical Union
Americans for Religious Liberty
American Jewish Committee
Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee
Becket Fund for Religious Liberty
B'nai B'rith International
Central Conference of American Rabbis
Christian Legal Society
Clifton Kirkpatrick, Stated Clerk of the Presbyterian Church (USA)
Council on Religious Freedom
Council on Spiritual Practices
Ethics & Religious Liberty Council of the Southern Baptist Convention
Friends Committee on National Legislation
General Council on Finance and Administration of The United Methodist Church
Hadassah, the Women's Zionist Organization of America
Hindu American Foundation
Institute on Religion & Public Policy
International Church of the Foursquare Gospel
International Commission on Freedom of Conscience
Jewish Council for Public Affairs
Jewish Prisoner Services International

Jewish Reconstructionist Federation
Liberty Counsel
Liberty Legal Institute
Mennonite Central Committee U.S., Washington Office
Minaret of Freedom Institute
National Council of the Churches of Christ in the USA
National Ministries, American Baptist Churches, USA
North American Religious Liberty Association
Northwest Religious Liberty Association
People For the American Way
Peyote Way Church of God
Philadelphia Ethical Society
Prison Fellowship
Queens Federation of Churches
Rabbinical Council of America
Seventh-day Adventist Church (General Conference World Headquarters)
Shambhala International
Shaykh Mohamed Hisham Kabbani, Chairman of the Islamic Supreme Council of America
Sikh American Legal Defense and Education Fund
Soka Gakkai International—USA
The Church of Jesus Christ of Latter-day Saints
The First Church of Christ, Scientist, in Boston, Massachusetts
The Interfaith Alliance Foundation
The United House of Prayer For All People of the Church on the Rock of the Apostolic Faith
Union for Reform Judaism
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association
United Sikhs
United States Conference of Catholic Bishops
United Synagogue of Conservative Judaism

APPENDIX B

This appendix lists a sample of Ohio laws that accommodate religious exercise without also accommodating secular constitutional rights.

- Exemption for those with religious objections from service in Ohio's militia, *see* OHIO REV. CODE ANN. § 5923.02(B);

- Property tax exemption for real property held by churches, *see* OHIO REV. CODE ANN. § 5709.07(3);

- Exemption for a "rabbi, priest, Christian Science practitioner, clergy, or member of a religious order . . . when the chemical dependency counseling activities are within the scope of the performance of their regular or specialized ministerial duties . . .," from Ohio's chemical dependency counselor licensing requirements, *see* OHIO REV. CODE ANN. § 4758.03(B);

- Exemption for minors consuming certain alcoholic beverages for religious purposes from underage drinking laws, *see* OHIO REV. CODE ANN. § 4301.631(H);

- Exemption for religious employers "opposed to benefits to employers and employees from any public or private insurance that makes payment in the event of death, disability, impairment, old age, or retirement or makes payments toward the cost of, or provides services in connection with the payment for, medical services," from required payment of premiums into Ohio's worker compensation system, *see* OHIO REV. CODE ANN. § 4123.15(A);

- Exemption for employees who have religious "objections to joining or financially supporting an employee organization" from required payment of fee to employee organization who secured collective bargaining agreement, *see* OHIO REV. CODE ANN. § 4117.09 (C);

- Exemption for children whose parents have religious objections to the test from required childhood health tests, *see, e.g.,* OHIO REV. CODE ANN. § 3701.508(2)-(3) (religious exemption from hearing tests); OHIO REV. CODE ANN. § 3742.30 (religious exemption from blood lead screening test); OHIO REV. CODE ANN. § 3701.501(2) (religious exemption from tests for genetic disorders); OHIO REV. CODE ANN. § 3313.71 (religious exemption from tuberculosis tests); OHIO REV. CODE ANN. § 3313.671 (religious exemption for immunization requirements);

- Availability of absentee ballots to any "elector . . . unable to vote on the day of an election on account of observance of the elector's religious belief," OHIO REV. CODE ANN. § 3509.02(6);

- Exemption for employees with religious objections to administering drugs from requirement that public school employees administer certain prescription drugs to students, *see* OHIO REV. CODE ANN. § 3313.713(F);

- Defense for care givers who "rel[y] upon treatment by spiritual means through prayer alone" to charge of patient neglect, *see* OHIO REV. CODE ANN. § 2903.34(B)(1) ;

- Defense for parents who for religious reasons do not provide medical or surgical care to a child to charge of child neglect; *see* OHIO REV. CODE ANN. § 2151.03(8);

- Privilege from arrest for persons "within, going to, or returning from their place of worship," *see* OHIO REV. CODE ANN. § 2331.11(5);

- Clergy-penitent privilege for a communicant's confessions or other information confidentially communicated to clergy, *see* OHIO REV. CODE ANN. § 2903.34(C);

- Exemption for "cloistered member[s] of a religious organization" from jury service, *see* OHIO REV. CODE ANN. § 2331.16(5);

- Exemption for religious objections to autopsy requirement of removing deceased's pituitary gland, *see* OHIO REV. CODE ANN. § 2108.53(C);

- Exemption for those with religious objections to requirements of testing and treatment of tuberculosis, *see* OHIO REV. CODE ANN. § 339.89;

- Exemption of church property from participation in Ohio's statutorily created "special improvement districts," *see* OHIO REV. CODE ANN. § 1710.02(A);

- Exemption for "bible colleges" and "bible institutes" to requirement that institutions conferring degrees or diplomas obtain a certificate of authorization from the Ohio board of regents, *see* OHIO REV. CODE ANN. § 1713.02(E);

- Exemption of religious organizations providing funeral services from state laws governing preneed funeral contracts, *see* OHIO REV. CODE ANN. § 1111.19(L);

- Exemption to protect the "religious freedom of any person or group" from animal slaughter laws, *see* OHIO REV. CODE ANN. § 945.02;

- Exemption for those whose "religion prohibits the person from obtaining a license" from Ohio's milk license requirements, *see* OHIO REV. CODE ANN. § 917.09(I);

- Accommodation of religious exercise in city jails and workhouses by requiring "provi[sion] of religious services therein each week" and permitting employment of "a clergyman or religious organization to conduct such services," *see* OHIO REV. CODE ANN. § 753.18.